(2009) 04 P&H CK 0218

In the Punjab And Haryana At Chandigarh

Dhir and Dhir Asset Reconstruction and Securitization Company Ltd. — APPELLANT

Vs

Air Liquide North India Private Ltd. and Others — RESPONDENT

Date of Decision : 22-04-2009

Acts Referred:

Companies Act, 1956 — Section 483
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(2)

Citation : (2009) 152 CompCas 604 : (2009) 93 SCL 207

Hon'ble Judges : M.M. Kumar, J;Augustine George Masih, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

M.M. Kumar, J.—This appeal filed u/s 483 of the Companies Act, 1956 (for brevity ''the Companies Act'') challenges order dated 26.3.2009 passed in C.P. No. 96 of 2008 alongwith various applications including C.A. No. 151 of 2009. The appeal has been preferred by reconstruction company namely Dhir and Dhir Asset. Reconstruction and Securitization Company Ltd. which was impleaded as party respondent No. 2 in a winding up petition filed by M/s. Air Liquide North India Private Limited-respondent No. 1-petitioner. In fact, Respondent No. 1-petitioner had filed an application u/s 22(1) of the Sick Industries (Special Provisions) Act, 1985 (for brevity ''the SICA Act'') seeking stay of proceedings on the ground that reference u/s 15(1) of the SICA Act was being considered in case No. 299 of 2004 and respondent No. 2, the Haryana Steel and Alloys had been declared sick. The application was rejected on the simple ground that the Appellant-Reconstruction Company has already taken over the Haryana Steel Alloys -respondent No. 2 under Sections 13(2) and 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interests Act, 2002 (for brevity ''the SARFAESI Act'') on 28.11.2008 when possession notice was issued. Accordingly, the application u/s 22(1) of the SICA Act has been dismissed by the learned Company Judge after recording the finding that reference before the BIFR has abated.

2. The Appellant Reconstruction Company moved an application being CA No. 151 of 2009 for modification of order dated 6.2.2009 passed by the learned Company Judge directing that assets of the company were not to be sold by any party without leave of the Court and had issued notice. The learned Company Judge adopted the reasoning given by him in his decision dated 20.3.2009 rendered in the case of PEGASUS Asset Reconstructions Company Pvt. Ltd. v. Haryana Concast Ltd. in CA Nos. 704 and 705 of 2008 in CP No. 133 of 2003 alongwith other Company Applications. In that judgement, the learned Company Judge made an attempt to harmonize the SARFAESI Act and the Companies Act. For the purpose of the instant case, the learned Company Judge observed as under:

.... I adopt the same reasoning here as well and the only modification in the order that I would make in the line of reasoning to conform to the facts of the case are that the operation of Section 446 of the Companies Act which talks about the procedure when a winding up order has been made or when the Official Liquidator has been appointed as Provisional Liquidator, has not yet arrived and the reference to a bar against institution of suit and other proceedings would not operate for the present. I reject the contention placed by the counsel for the petitioner that since the application has been filed before the purported act of reconstruction company to take over the assets u/s 13(4), it shall be construed, with reference to Section 441(2) of the Companies Act, that the winding up of the company the Tribunal (Court) shall be deemed to commence at the time of presentation of the petition for winding up. In my view, if the order of winding up is made by virtue of Section 441(2), it would relate back to the time of presentation of the petition. The order of winding up has not yet been made and I have directed counter of the company to be filed after dismissal of its application u/s 22 of SICA. The matter will be taken up for consideration in future. As of now, it will be premature to pass any orders u/s 446.

(emphasis added)

3. The prayer of the appellant for modification of the directions issued on 6.2.2009 was partially accepted by holding as under:

8. As regards the direction that I have already made against alienation of assets, it shall stand modified to permit reconstruction company to take further proceedings under the SARFAESI Act. However, by the construction that I have made in the decision referred to above in PEGASUS Asset Reconstructions company Pvt. Ltd., which reasoning I adopt in this case as well, that the petitioner would be permitted to move this Court for appropriate directions if the petition for winding up is considered favourably. The ultimate directions shall follow on what is held on the outcome of petition for winding up. In the meanwhile, no appropriation or disbursal of the sale proceedings shall be

undertaken by the Asset Reconstruction Company without leave of this Court.

4. The grievance now made by the appellant is that by virtue of the aforesaid directions issued by the learned Company Judge fetters have been put on the discretion of the appellant which would not permit the Appellant Reconstruction Company to proceed in accordance with Section 13(7).

5. Mr. Ashok Aggarwal, learned Senior counsel for the Appellant-Reconstruction Company has argued that putting of such fetters on the functioning of Reconstruction Company would defeat the very purpose of SARFAESI Act and such fetters are impermissible by keeping in view the nature and spirit of the SARFAESI Act. Mr. Aggarwal, learned Senior counsel has vehemently submitted that a Reconstruction Company like the Appellant is a free bird and the Company Court completely looses its jurisdiction to control the functioning of a Reconstruction Company. Therefore, he has argued that the learned Company Judge committed grave error in law by putting various fetters requiring the Appellant Reconstruction Company to obtain prior permission of the Court with regard to appropriation or disbursal of the sale proceeds.

6. Having heard the learned Counsel at a considerable length and perusing the order passed by the learned Company Judge in PEGASUS Asset case (supra) as well as the order impugned in the instant appeal we are of the considered opinion that the view taken by the learned Company Judge does not suffer from any legal infirmity warranting interference of this Court. A perusal of the directions issued in para 8 of the order, extracted above, shows that it is left open to the Appellant Reconstruction Company to move the Company Court for appropriate directions if the petition for winding up is considered favourably. The winding up petition is still pending. The situation is fluid in the sense that at this stage it cannot be concluded as to whether there would be an order of winding up or not. If there is an order of winding up then the labour dues as contemplated by Section 529A of the Companies Act would require to be paid by the Appellant Reconstruction Company as per the requirement of Section 13(9) of the SARFAESI Act. The directions issued by the learned Company Judge do not go to the extent of stopping the working of Appellant Reconstruction Company. The directions infact are supervisory in nature and aims at ensuring that dues of every one as permissible by law gets paid. The learned Company Judge has further issued supervisory directions by asking the Appellant Reconstruction Company to refrain from appropriation or disbursal of the sale proceeds without leave of the Court. It is not a case where it could be said that the learned Company Judge had interfered with the functioning of the reconstruction company because as and when any funds are required to be spent as per the provisions of Section 13(7) of the SARFAESI Act it could be done by the leave of the Court. The Appellant- Reconstruction Company has been granted liberty not only to take possession of the assets but to even proceed with the sale of those assets subject to a rider that no appropriation or disbursal of the sale proceeds is to be undertaken by the AppellantReconstruction company without leave of the

Court. We are not persuaded to accept the thesis propounded by Mr. Ashok Aggarwal, learned senior counsel, that the appellantreconstruction company is a completely ''free bird''. A perusal of Section 13(9) of the SARFAESI Act would show that labour dues as contemplated by Section 529 A of the Companies Act have to be paid by the appellantreconstruction company. At this stage it would be the duty of the learned Company Judge to ensure that provisions of Section 13(9) are complied with. It is worthwhile to notice that the appellantreconstruction company is already kept outside the winding up and is required to give information to the Official Liquidator with regard to the proposal of sale etc. The sale notice to the public has to contain clause that winding up proceedings are pending before the Company Court. These directions are merely supervisory in character and do not put such fetters so as to conclude that the Appellant Reconstruction Company cannot conduct its function properly. The appeal does not warrant admission and the same is dismissed.